Committee on Rulemaking
Minutes
August 24, 2011

Members Attending

Robert Rivkin	Richard Pierce	Lon Smith
Esa Sferra-Bonistalli	Robert Shapiro	George Madison
Elizabeth McFadden	Neil Eisner	Sally Katzen
Nina Mendelson	Cynthia Farina	

ACUS Staff Attending

Paul R. Verkuil	Jonathan R. Siegel	Emily S. Bremer
Chairman	Director of Research & Policy	Staff Counsel
Funmi Olorunnipa		
Attorney Advisor		

Invited Guests Attending

Cary Coglianese
Consultant

The meeting commenced at 2:07 p.m. in the conference room of the Administrative Conference. Following introductions, a member of the committee moved to permit public attendees to speak during the meeting. The motion passed unanimously on a voice vote.

Professor Coglianese gave a brief summary of his report, explaining the common thread of his recommendations is that rulemaking is inherently important and deserves to be highlighted on any agency's web site. He summarized the research underlying the report, including his empirical findings, conclusions, and recommendations.

Using Agency Websites to Highlight Rulemaking Activities

Mr. Rivkin raised the first issue on the agenda: how agencies should use websites to highlight rulemaking activities. Mr. Shapiro asked how this recommendation fits into the Conference's other e-rulemaking recommendations. Mr. Siegel explained that this project is intended to identify and disseminate good practices of individual agencies in e-rulemaking.

Ms. Katzen asked whether agencies' use of websites in e-rulemaking *should* be uniform, given how different agencies are from one another. Perhaps the recommendations should encourage innovation and transformative e-rulemaking experiments by agencies. Mr. Siegel and Professor Farina agreed, and Professor Farina further suggested that paragraph 10 of the draft recommendation be redrafted to emphasize agencies should continue to experiment and innovate.

Ms. Sferra-Bonistalli agreed that innovation and individualism can be a benefit, but pointed out that having a uniform point of entry could be very useful to users of agency websites. Some uniformity might also help agencies by making it easier to identify best practices that can improve agency outreach in the face of resource limitations.

Mr. Shapiro and Professor Pierce noted the Conference's e-rulemaking recommendations need to be consistent with each other, and Professor Pierce observed that the paragraph recommending agencies use facilitators might be legally problematic if used improperly. Perhaps a clarification that it be confined to pre-proposal stages of rulemaking would prevent the language from being misleading and creating legal problems.

Professor Farina strongly supported the paragraph recommending agency use of facilitator services, but suggested a tweak to the language: "agencies should consider in appropriate rulemakings retaining facilitator services to manage online, agency-sanctioned rulemaking discussions." Professor Pierce was not sure that solved the legal problem of agencies creating two separate tracks—one an informal discussion via facilitator, and the other the notice-and-comment proceeding. Unsophisticated participants are likely to confuse the two, and making the former agency-sanctioned would not solve the problem.

Mr. Siegel was not sure that an agency's use of social media would hurt it on judicial review if it held a notice-and-comment proceeding. Professor Pierce said it would only be a problem if the agency relied on something in the social media discussion in the rulemaking. It might also raise issues about whether it is a legal public meeting. And it could confuse people. The agency would have to issue a clear notice that it would not consider new proposals, data, etc. from the social media discussion in the rulemaking. Professor Mendelson suggested adding language to paragraph three directing agencies to provide clear notice of how the agency will treat the comments. Ms. Sferra-Bonistalli agreed.

Ms. Sferra-Bonistalli stated she would support a recommendation that the facilitator can summarize the social media discussion and file it in the docket. She believed this would encourage public participation in the rulemaking. Mr. Otis suggested the language should not require that the facilitator be external to the agency. Agencies can't always afford to hire outside. Mr. Rivkin noted that if agency personnel fill the role of the facilitator, there may be greater onus on the agency to clarify how the discussion will be used in the rulemaking. There seemed to be general agreement on this point.

Mr. Eisner suggested paragraph two should not put the burden on the agency, but should rather allow agencies to use available tools or data created by other parties. The work necessary to fulfill the recommendation's aim is better done centrally. Professor Coglianese noted that page 39 of his report addresses the use of centrally developed information. A representative from the eRulemaking PMO clarified that an agency can provide a link on its own website to a

canned search on Regulations.gov. Agencies can use this tool to direct users to the specific information they need. The Federal Register is in the process of creating a similar tool.

Professor Farina suggested that paragraph one should be aimed getting non-participating stakeholders, rather than the general public, to participate. Mr. Eisner agreed, but thought it should be aimed at both. The committee appeared to agree on this.

Improving the Accessibility of Agency Websites

Mr. Rivkin moved the discussion to questions of increasing the accessibility of agency websites. Mr. Pierce was concerned that paragraph five seems very open ended and may be politically controversial. The decision of whether to provide information in languages other than English should be left to agencies. Mr. Madison noted that diminishing resources make it impossible to provide your website in multiple languages. Mr. Otis noted that the accuracy of translation can create difficult issues for an agency on judicial review. Several members of the committee expressed concern that there are too many possible languages into which an agency might translate materials. There are also few circumstances providing a compelling justification for translation, and no clear limits on the proposed recommendation to translate.

Mr. Eisner suggested limiting the translation recommendation to circumstances in which translation is necessary to protect public health and safety. Ms. Sferra-Bonistalli suggested softening the language to more generally encourage agencies to improve access for groups that do not traditionally participate in rulemaking, which might include foreign language speakers. Ms. Katzen agreed the accessibility paragraphs were too prescriptive and should be scaled back. She suggested using language from the report to make them softer and more aspirational. Mr. Shapiro suggested shifting the focus of these paragraphs to parts of agency websites that impose requirements on public.

Mr. Rivkin asked the members of the committee to confirm they want to eliminate or soften paragraph five. There was general agreement that they did.

Professor Farina noted that text-only websites have broader uses than paragraph six suggests. For example, such websites may facilitate access for users with disabilities. She further observed that "Section 508" is a term of art without a good set of standards. The U.S. Access Board is doing a rulemaking to update the Section 508 guidelines, but it's not finished yet. In this context, saying agencies should comply with Section 508 leaves a lot of questions unanswered. Professor Coglianese suggested that the point is not Section 508, but rather making agencies aware of the importance of facilitating access for the disabled.

Ms. McFadden suggested all the paragraphs addressing accessibility issues could be consolidated into a single paragraph. She urged that both this paragraph and paragraph one should be phrased to avoid the criticism that would be implicit in referring to nonparticipating

segments of the public. She suggested that a better way to phrase it would be speak of populations that "have not effectively participated in the past."

Maintaining the Accessibility of Agency Websites Over Time

The Committee adjourned for a short break before discussing issues of maintaining websites in an accessible form over time. Mr. Eisner suggested that paragraph eight should apply to regulations.gov and be changed to urge agencies to display "any" comment policies because some agencies do not have unique comment policies posted on their individual websites. Mr. Siegel observed the Conference has recently recommended that all agencies have comment policies. Professor Coglianese explained that his intention was to focus on what agencies should do when they invite comments on their own website. In such circumstances, agencies should provide comment policies in the same place comments are accepted.

Ms. Sferra-Bonistalli was not sure why it would be necessary to have a rulemaking comment policy posted in multiple, accessible locations. She also suggested the language of paragraph eight should more clearly recommend that comment policies be provided with other rulemaking information on agency websites. There appeared to be consensus among committee members that paragraphs eight through 10 should be clearly limited to "rulemaking."

The Committee turned to the preamble. Mr. Eisner thought it inadequate and suggested it needs more detail to provide context for the recommendation paragraphs. Mr. Otis suggested that the definition of e-rulemaking is inaccurate and too narrow. He noted that regulations.gov centralizes only a narrow band of e-rulemaking activities and that it might be better to define the goals of e-rulemaking in the preamble. The preamble could borrow language from pages six and seven of the report or use the definition of e-rulemaking included in the Conference's recent recommendation, *Legal Considerations in e-Rulemaking*.

Mr. Rivkin asked if the public attendees had any comments. Mr. Curtis Copeland (Congressional Research Service) suggested that paragraphs one through three seem to expect the public to come to agencies, rather than encouraging agencies to engage the public.

The Committee decided to forgo a drafting subcommittee and allow Conference staff to revise the recommendation in accord with the Committee's discussion. The meeting was adjourned at 4:27 p.m.